

Abisheganaden who appeared for him in the Court below was present and intimated he held a watching brief on behalf of the respondent.

At the close of Counsel for the appellant's argument, in view of the respondent's obvious inability to present his own case, I invited Mr. Abisheganaden to appear and argue the case on the respondent's behalf as *amicus curiae*.

On the conclusion of the hearing I allowed the appeal and directed that the order of the Magistrate that the respondent do pay a nominal sum of \$10 to the City Council be set aside. I further directed that the question of what sum should be paid by the respondent to the City Council by way of satisfaction for the damage done to the street lighting pole be referred back to the City Magistrate's Court for determination. I indicated I would give my reasons briefly in writing later.

That this Court had jurisdiction to entertain this appeal is established by section 371 of the Municipal Ordinance and the only issue of substance for determination is as to the construction of sub-section 10 of section 259 of the Municipal Ordinance which reads as follows:—

"Any person who carelessly or accidentally throws down or damages any pipe, line, pillar or lamp, whether within or without the Municipality, belonging to the Commissioners shall pay such sum of money by way of satisfaction to the Commissioners for the damage done, not exceeding five hundred dollars, as any Police Court thinks reasonable. Nothing in this sub-section shall prevent the Commissioners from taking any legal proceedings open to them at law before any Court having jurisdiction for the recovery of the full amount of the damages so caused by such person."

The object of the sub-section clearly was to enable the City Council to recover a sum in compensation for the damage caused either accidentally or carelessly to its property specified in the sub-section as a penalty in a summary way. The sum recoverable must be such as a Police Court thinks reasonable in relation to the damage actually caused, not exceeding five hundred dollars.

In my opinion the appellant had the option to proceed either at common law for negligence or under section 259 (10) of the Municipal Ordinance to recover a sum in compensation up to five hundred dollars before the City Magistrate without proving negligence.

The respondent having pleaded guilty to the charge of accidentally damaging the street lighting pole the only remaining issue was as to what sum the Court considered reasonable should be paid by way of satisfaction for the damage done.

If the Court considered that \$232.22 was a reasonable sum to be paid in compensation for the damage done to the street lighting lamp then that sum should have been awarded.

The learned City Magistrate in awarding a nominal sum of \$10 was, in my view, labouring under a misconception. He appeared to be under the impression that he could apportion the damage between the respondent and the trishaw rider, who was not a party to the proceedings in the Court below, which of necessity involved considerations of negligence, but, as I have indicated, the very purpose of the sub-section was to avoid any such considerations. In my view he had no power in this case to apportion the damage.

It was of course always open to the respondent if he could establish negligence on the part of the trishaw rider to take proceedings against him to recover such sum as he, the respondent, was called upon to pay.

There was, as I have already mentioned, nothing on the record to indicate what the damage was or how the amount of \$232.22 was arrived at nor did it appear that the learned Magistrate directed his mind to the question.

In these circumstances I allowed the appeal and set aside the order of the Magistrate that the respondent do pay a nominal sum of \$10 to the City Council. The question of the amount to be paid by the respondent to the City Council by way of satisfaction for the damage done to the street lighting pole must be referred back to the City Magistrate's Court for determination in the light of this judgment.

Appeal allowed.

Solicitors: *Allen & Gledhill; C. J. Koh & Co.*

NEO KOON CHEO v. REG.

[A.Cr.J. (Ambrose J.) January 17, 1959]

[Singapore — Magistrate's Appeal No. 87 of 1958]

Dangerous Drugs Ordinance (Cap. 137), s.37(c) and (d) — Possession — Statutory Presumption — Onus of proof — "Custody, control and possession" — Meaning of.

In this case a party of three detectives made a raid on the attic of a premises, and on entering the attic two of the detectives saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools.

The appellant was charged with possession of prepared opium and smoking utensils in contravention of sections 9 and 10(2) respectively of the Dangerous Drugs Ordinance. In his defence the appellant said that he went to the premises in question with a friend to see the occupier to buy a fishing net, but was told by the occupier's wife that her husband was out. She asked them to go to the roof garden and wait, so they went upstairs and sat in the attic, and about 10 minutes later, he said, the detectives entered the attic. He denied holding the tin at any time, or ownership of it or its contents.

The appellant was convicted of both offences. On appeal he contended, *inter alia*, that there was no evidence of possession.

Held: (1) as regards the charge of possession of prepared opium, the presumption in section 37(d) of the Dangerous Drugs Ordinance applied. A person has a thing in his custody if he has actual physical control over it and knows that it is in his actual physical control;

(2) dissenting from *Ho Seng Seng v. R.*⁽¹⁾, to invoke the presumption, it is not necessary for the prosecution to prove that the person knew that the thing was a dangerous drug. The purpose of a statutory presumption is nullified if the prosecution has to prove the very thing that is to be presumed;

(3) the conviction on both charges could be supported without having recourse to the presumption under section 37(d) of the Ordinance. As the opium pipe-head and the chandu and chandu dross were found in the attic, the presumption arose under section 37(c) of the Ordinance that the attic was used for the smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. As the contents of the confectionery tin were in the appellant's physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was rightly found to be in possession of the contents of the tin.

Case referred to:—

(1) *Ho Seng Seng v. R.* (1951) M.L.J. 225.

MAGISTRATE'S APPEAL.

L. Rayner for the appellant.

Goh Heng Leong (Crown Counsel) for the respondent.

Ambrose J.:—The appellant was charged with:

(1) possession of prepared opium in contravention of section 9 of the Dangerous Drugs Ordinance; and

(2) possession of smoking utensils in contravention of section 10(2) of the same Ordinance.

He was convicted of both offences and ordered to be remanded for a period of four weeks for the purposes of an examination and report by the Opium Treatment Centre's Advisory Committee.

The evidence for the prosecution was as follows. A raid was made by a detective sergeant, a detective corporal and a detective on the attic of No. 26, New Bridge Road, on the 21st January, 1958, about 8.20 p.m. On enter-

ing the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools.

The defence was that the appellant went with a friend to the premises in question to see the occupier, who was one Kia Beng Seng, to buy a fishing net. The appellant and his friend were told by the occupier's wife that the occupier was out. She asked them to go to the roof garden and wait. They went upstairs and sat in the attic. The detectives entered the attic after they had been there for 10 minutes. The confectionery tin was in a corner of the attic. The appellant did not hold the tin at any time. Neither the tin nor its contents belonged to him.

One ground of appeal was that there was an irreconcilable conflict between the evidence of the detective corporal in Court and his statement to the police. The detective corporal said in Court that he felt the pipe-head which was in the tin and found that it was warm. He did not say so in his statement to the police. In my view, an omission of this sort from the statement to the police is not a serious discrepancy. The Magistrate considered that it was not likely that the detective corporal was lying when he said the pipe-head was warm but that it was possible that he was honestly confusing the facts of another opium case with the present one. Counsel for the appellant contended that such a possibility of confusion should have created a doubt in the mind of the Magistrate, the benefit of which should have been given to the appellant. In my opinion, the Magistrate gave the benefit of the doubt to the appellant by refraining from finding as a fact that the pipe-head was warm.

Another ground of appeal was that there was no evidence of possession. I shall deal first with the charge relating to possession of prepared opium. The Magistrate was satisfied beyond reasonable doubt that the appellant did attempt to take out of the attic the confectionery tin in which were found a small tin containing chandu dross and a phial containing chandu. I can see no reason for interfering with this finding of fact. Chandu dross and chandu come within the definition of "prepared opium" to be found in section 2 of the Dangerous Drugs Ordinance. Prepared opium is a dangerous drug as defined in the same section. Section 37(d) of

the Dangerous Drugs Ordinance provides as follows:

"any person who is found to have in his custody or under his control any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

What does the word "custody" mean? According to the view expressed by Brown, Ag. C.J., in *Ho Seng Seng v. Rex*,⁽¹⁾ it means watching over or keeping safe. With great respect to the learned Judge, I am unable to agree with his view that the difference between "control" and "custody" is that "control" implies a power of disposal while "custody" does not.

I have given the most careful consideration to the meaning of the word "custody" in section 37(d) of the Ordinance under consideration and have come to the conclusion that it means actual physical control. The word "control" in the same section must, therefore, be construed to mean any form of control other than actual physical control. Other names for "custody" are "physical possession," "*de facto* possession" and "detention." It is referred to in 25 *Halsbury's Laws* (2nd Edn.) 194, para. 327, in these terms:

"The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession or detention."

I would adopt the following definitions of "custody" and "possession" given by the eminent American jurist, Roscoe Pound, in his "Introduction to American Law":

"Custody is a mere condition of fact, a mere physical holding of or physical control over the thing."

Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession."

Support for my view that "custody" means actual physical control is to be found in Regulation 6(2)(b) of the Dangerous Drugs Regulations, 1951, which provides as follows:—

"For the purposes of these Regulations:— a person shall be deemed to be in possession of a drug or preparation if it is in his actual custody or is held by any other person subject to his control or for him or on his behalf."

From this it follows that under this Regulation a drug is in a person's actual custody if it is held by him and not by someone else, i.e. if it is in his actual physical control.

In my view, the appellant had custody of the confectionery tin in the sense that it was

A in his actual physical control. The question for consideration is whether the appellant had custody of the chandu dross and chandu which were inside the confectionery tin. A person cannot be said to have custody of a thing unless he knows it is in his custody. It is not necessary B for the person to know the nature of the thing so long as he knows it is in his custody. As the appellant was seen attempting to take the confectionery tin with its contents out of the attic the conclusion is irresistible that he knew that the tin contained certain articles and was not empty. In my opinion, therefore, the appellant C had custody of the chandu and the chandu dross contained in the tin. The presumption under section 37(d) of the Dangerous Drugs Ordinance accordingly arose. The appellant must, therefore, until the contrary is proved, be deemed to D have been in possession of the chandu and the chandu dross and to have known that they were chandu and chandu dross.

According to the view expressed by Brown, Ag. C.J., in the case of *Ho Seng Seng v. Rex*, *supra*, before the presumption can be invoked E the prosecution must prove that the accused knew not only that the things in question were in his custody but also that they were dangerous drugs. To my mind, with all due respect to the learned Judge, the purpose of a statutory presumption is nullified if the prosecution has to F prove the very thing that is to be presumed. In my opinion, an interpretation which gives full effect to the statutory presumption is to be preferred to an interpretation which defeats the legislature's intention of shifting the burden of proof to the accused.

G If my interpretation of section 37(d) of the Dangerous Drugs Ordinance is correct, the onus was on the appellant to prove that he was not in possession of the chandu and chandu dross and that he did not know that they were chandu and chandu dross. This onus is not as heavy H as the onus on the prosecution. All that the appellant had to do was to establish the probability of that which he was required to prove. This the appellant failed to do. He merely denied holding the confectionery tin and said that it was found by the detectives in a corner I of the attic. It would have been sufficient for him to raise a doubt in the Magistrate's mind as to whether he was in possession of the chandu and chandu dross or as to whether he knew that the things in the confectionery tin were chandu and chandu dross. Even this he failed to do. I

hold, therefore, that he was properly convicted on the first charge.

If my interpretation of section 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under section 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic it must be presumed, until the contrary is proved, under section 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless the presumption under section 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the chandu and chandu dross.

As regards the charge of possession of smoking utensils the presumption under section 37(d) of the Ordinance does not apply. For the reasons given in the last paragraph, however, the appellant was in my opinion rightly convicted on the second charge.

I found no substance in the other grounds of appeal and, therefore, dismiss the appeal.

Appeal dismissed.

**KHATIJABAI JIWA HASHIM v. ZENAB d/o
CHANDU NANSI, EXECUTRIX OF HAJI
G. H. HARJI**

[J.C. (Lord Tucker, Lord Cohen and Mr. L.M.D. de Silva)
November 5, 1958]

*Privy Council — Practice — Appeal —
Withdrawal of appearance — Judicial Committee
Rules, 1925 and 1957.*

There is no express provision for the withdrawal of appearance contained in the Judicial Committee Rules, 1925 and 1957.

A PETITION.

On December 7, 1957, the Court of Appeal for Eastern Africa granted to the petitioner, leave to appeal to Her Majesty in Council from a judgment of that Court dated March 29, 1956, ordering that a contract whereby the petitioner (who was the defendant) had agreed to sell certain land at Nairobi should be specifically performed. On December 19, 1957, the petitioner, by the solicitors then acting for her and on her behalf, entered an appearance in the appeal at the Privy Council Office, pursuant to r. 21 of the Judicial Committee Rules, 1925. On March 14, 1958, after correspondence between the solicitors and the petitioner, the solicitors withdrew the appearance. The petitioner instructed new solicitors, but the petition stated that they in fact took no further steps in the appeal, and, in particular, did not take any of the steps prescribed in r. 86, namely, to give notice in writing of the change of agents to the Registrar, and to the outgoing agents, and to amend the appearance accordingly. By letter of April 16, 1958, the Registrar informed the Registrar of the Court of Appeal for Eastern Africa that the petitioner's appeal had been dismissed for want of prosecution under and by virtue of r. 34. The petitioner applied for leave to restore the appeal but her petition was dismissed on July 16, 1958. The petitioner now sought an order that her appeal was still pending.

[Editorial Note: the relevant rules at this time were the Judicial Committee Rules, 1957; the numbers of rr. 34 and 86 are the same in those of 1925 and those of 1957.]

D. N. Pritt, Q.C., and A. R. Campbell for the petitioner.

Dingle Foot, Q.C., and T. O. Kellock for the respondent.

Lord Tucker, after their Lordships had consulted, said that they would humbly advise Her Majesty that this petition be allowed, and that an order be made as prayed in the petition declaring that "notwithstanding the order made as aforesaid on July 16, 1958, dismissing your petitioner's application for leave to restore, and notwithstanding all or any other matters or steps that may have occurred or been taken, the appearance entered by [the original solicitors] on December 19, 1957, still stands as an effective appearance, and that this appeal is still pending." Their Lordships also ordered that the period prescribed by rule 22 should be extended until 10 days from the date of Her Majesty's order herein, and that there should be no order as to the costs of this petition.

Petition allowed.

Solicitors: Theodore Goddard & Co.; Herbert Oppenheimer, Nathan & Vandyk.